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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 693

BERTHA V. MOORE,

Petitioner,

v.

THE P. W. PUBLISHING COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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TABLE OF CONTENTS.

Opinions Below ---------- 1

Jurisdiction ---------- 1

Questions Presented ---------- 2

Constitutional Provisions and Statutes Involved ---------- 2

Statement of Case ---------- 3

Argument ---------- 8

Conclusion ---------- 11

Appendices:

1. Opinion of the Supreme Court of Ohio ---------- 12
2. Judgment of the Supreme Court of Ohio ---------- 21
3. Opinion of the Court of Appeals of Summit County, Ohio ---------- 22
4. Journal Entry of the Court of Common Pleas of Summit County, Ohio ---------- 27
5. Special Verdict in the Court of Common Pleas of Summit County, Ohio ---------- 27
6. Notice of Appeal to Supreme Court of Ohio ---------- 31
7. Definitions of "Uncle Tom" ---------- 32
8. Political Flysheet Printed by Respondent for Use in 1962 Election Campaign ---------- 37

TABLE OF AUTHORITIES.

Cases.

Abott v. Tacoma Bank, 175 U. S. 409, 20 S. Ct. 153, 44 L. Ed. 217 ---------- 9

Beacon Theatres, Inc. v. Westover, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 ---------- 10

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226 ---- 10

Justices of the Supreme Court v. U. S. ex rel. Murray, 9 Wall. 274 ---------- 10

Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 ---------- 9

New York Times v. Sullivan, 376 U. S. 254 (1964) --2, 8, 9

Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 ---------- 9

Staub v. City of Baxley, 78 S. Ct. 277, 355 U. S. 313, 2 L. Ed. 2d 302 ---------- 8

Constitutions.

Constitution of the United States:

First Amendment ----------2, 8, 9

Seventh Amendment ---------- 2

Fourteenth Amendment ----------2, 8, 9

Constitution of Ohio, Article I, Section 5 ---------- 3, 11

Statutes.

Ohio Revised Code, Sec. 2739.14 ---------- 9

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THE P. W. PUBLISHING COMPANY, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Bertha V. Moore prays that a writ of certiorari issue to review the judgment entered in this case on July 28, 1965, by the Supreme Court of Ohio.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported at 3 Ohio St. 2nd 183 and is set out in the Appendix. The opinion of the Ninth District Court of Appeals is unreported but is also set out in the Appendix. The judgment of the Court of Common Pleas, in which the case was tried, and the special verdict rendered in that court by the jury are likewise contained in the Appendix.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on July 28, 1965. The jurisdiction of this Court is invoked under Section 1257 of the Judicial Code, as amended by the Act of 1948.

QUESTIONS PRESENTED.

(1) Whether, under the decision of this Court in the case of *New York Times v. Sullivan,* a newspaper has immunity under the First and Fourteenth Amendments to maliciously publish of and about a private Negro woman the false and libelous charge that she is an "Uncle Tom" for the sole purpose of gaining state political office for its editor.

(2) Whether a state court may on review deprive a Negro plaintiff of the judgment to which she is entitled upon the evidence and verdict of a jury by invading the province of the jury and making and substituting its own finding of fact entirely unsupported by the evidence.

(3) Whether a state court may deprive a private citizen of his good name and reputation without due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Amendment XIV, Section 1, of the Constitution of the United States provides in part:

> "* * * No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VII of the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the

United States, than according to the rules of the common law."

Article I, Section 5, of the Constitution of Ohio provides:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

STATEMENT OF CASE.

On March 10, 1962, the respondent, an Ohio corporation owned by Negro Republican, William O. Walker, printed and published on the front page of its newspaper, The Cleveland Call and Post, a headline and article accompanied by a picture of the petitioner, Bertha V. Moore. Mrs. Moore was and is a prominent and respected member of the Negro community. The Call and Post is a weekly paper with wide circulation among Negroes within and outside the State of Ohio. The article, which is contained at page 331 of the Record, purported to be a factual account of what was reported to have occurred on March 6, 1962, at a meeting with Governor Michael V. DiSalle attended by several local Negroes, including the petitioner, at the University of Akron where the Governor was conducting a seminar on government. Although at trial, the defendant failed to produce anyone in any way connected with the source or composition of the article, Walker testified it was published as a "news story." On its face, the publication purported to be an account of fact, not comment, documented by what were claimed to be statements obtained from persons present at the meeting. Written as a news account, the article falsely quoted Governor DiSalle as calling the petitioner an "Uncle Tom," a phrase

which though originally the name of a character in Harriet Beecher Stowe's novel, "Uncle Tom's Cabin," published in 1851, has in recent decades, come to mean among Negroes and a large segment of the white population familiar with its current usage, a Negro, who, in return for selfish reward, sells out and betrays his race and allows himself to be used as an instrument by which its members are subjugated and prevented from attaining equality among men. This definition was established by the evidence and finds overwhelming support in the context in which it is used in contemporary writings, some of which are printed in the Appendix. The respondent's article falsely quoted the Governor as charging that as an "Uncle Tom," the petitioner was a detriment to her Negro minority group; that he berated her for "gross ingratitude" to her political party, and charged that she had been well rewarded for political services she had not performed. To add credence to the charges quoted as having been made by the Governor against the petitioner, the respondent related that no one spoke up to defend the petitioner against the Governor's attack, that several of those present told the respondent that the petitioner had it coming, and that upon being asked by the petitioner if he was trying to "kill" her, the Governor remained silent.

With reference to special damages, the evidence established the following facts (R. 71-78, 103-104, 119):

The respondent's publication of March 10th was widely circulated among the state's Negro population. At the time, the petitioner was engaged in selling automobile license plates, an occupation she had conducted for approximately ten years. For each set of plates sold she received thirty-five cents. From 1959 through 1962, she sold license plates at the same location and had the same

annual expense for overhead. Through the years the petitioner's sales had increased and she had many customers who regularly patronized her each year. In 1959, petitioner's sales were less than $14,000. In 1960, they were $15,000 and in 1961, they were $18,000. The petitioner testified during trial that she noticed that the respondent's March 10th article was adversely affecting her sales: that immediately after the publication was circulated in Summit County, she noticed that her sales declined and that people who had regularly bought their plates from her in the past did not return; that in 1962 her sales were $1,500 to $2,000 less than they were in the previous year; that during the latter part of March, 1962, and subsequent to circulation of the respondent's publication, her sales were less than they were for the same period in the previous year, and that to her knowledge there was nothing other than the publication which occurred or existed to account for the loss. The record is utterly barren of evidence affording the slightest suggestion of any cause or circumstance, other than the publication, to account for or explain the sudden decline and loss which occurred in the petitioner's sales contemporaneously with the circulation of the respondent's March 10th article. The record does contain direct testimony of witnesses familiar with the ordinary meaning of the name today that the charge that the petitioner was an "Uncle Tom" would, if believed, deter other persons from doing business with her (R. 34, 49).

Shortly after the publication of March 10th, the petitioner telephoned the respondent's owner and editor, William O. Walker, in Cleveland. She informed him that the Governor had not made the charges against her which the respondent had quoted him as having made and demanded

that the respondent refrain from any repetition of the same or similar statements and that it print a true report and retract its false account. Walker assured her that there would be no repetition of the statement and that the respondent would have someone on its behalf call upon the petitioner to obtain a corrected statement for publication. This the respondent never did. Instead, it took the statements and charges from its "news" article of March 10th and printed them as part of a partisan political flysheet (set forth in the Appendix) for use by the campaign committee of Governor DiSalle's opponent in the November, 1962 election. On October 6 and October 13, 1962, the respondent reprinted and republished under the designation, "Editorials" (R. 333), the identical articles which had appeared in the political flysheets.

The respondent's article of March 10th and its various repetitions were part of a series designed and intended by the respondent to smear Democratic Governor DiSalle and to alienate the Negro vote against him and in favor of his Republican opponent in the 1962 election. In recognition of the way in which he used his newspaper to deliver the Negro vote, William O. Walker was appointed by DiSalle's successor to the state cabinet as Director of Industrial Relations, an office which he still holds.

On October 23, 1962, the petitioner filed her petition in the Common Pleas Court of Summit County for damages in the sum of $85,000, alleging the respondent's March 10th publication to be libelous, malicious and to have caused her money loss. Thereafter the respondent filed six consecutive motions without properly seeking to have any of the allegations of the petition made more detailed or specific. On October 15, 1963, after trial, an all-white jury returned a special verdict consisting of answers to ten

questions embodying the determinative issues of the case. In its verdict which is set forth in the Appendix, the jury found specially that the statement in the respondent's March 10th publication that Governor DiSalle had called the petitioner an "Uncle Tom" was false; that the name "Uncle Tom" as applied to the petitioner imputed to her conduct that tended to harm her reputation, lower her in the estimation of the community and deter persons from associating or dealing with her; that the name "Uncle Tom" as applied to the petitioner by the respondent proximately caused the petitioner monetary loss in her business of selling automobile license plates; that the respondent published the March 10th article with actual malice; that the petitioner was entitled to recover punitive and compensatory damages in the total sum of $32,000; and that the March 10th publication was not a fair, reasonable and impartial account. Judgment on the verdict was entered in favor of the petitioner. Upon appeal, the Ninth District Court of Appeals affirmed the judgment below, finding that the publication was libelous per se and that the petitioner had proved special damages. The Supreme Court of Ohio, six of whose seven members are Republican, and one of whom is the former Governor of Ohio who was defeated for reelection by Michael DiSalle in 1958, allowed appeal and on July 28, 1965 reversed the judgment below and rendered final judgment for the respondent, holding that the publication was not libelous per se as found by the jury and Court of Appeals, and, notwithstanding the evidence and verdict, that there was a "total lack of evidence of special damages."

ARGUMENT.

The writ should be granted for the following reasons:

(1) This Court's decision in *New York Times v. Sullivan* makes necessary judicial assertion of the Constitutional limitations on the right of the press in contemporary times to commit malicious injury to private reputation.

Although it allowed review of the case on the respondent's claim (Appendix 5) that the judgment of the lower courts violated the First and Fourteenth Amendments to the Constitution and that the action involved substantial Constitutional questions, the Supreme Court of Ohio, in an obvious effort to foreclose review by this Court, attempted to place full reliance in reversing the judgment below on grounds it regarded as non-federal. It is interesting to note that not once in its opinion does the Ohio Court refer to this Court's decision in the case of *New York Times v. Sullivan,* so frequently cited by the respondent in its appeal. Had the Ohio Supreme Court reversed on the basis of the *Sullivan* case, there can be little doubt but that its judgment would be reviewable by this Court. As it was, in seeking to preclude review by this Court, the Supreme Court of Ohio resorts to its own independent findings of fact, utterly at odds with the evidence, and entirely outside its province, that the name "Uncle Tom" is not libelous per se and that the petitioner proved no special damages.

This Court, of course, is not bound by the state court's reliance upon non-federal grounds which lack any support in the record as a means of depriving the petitioner of civil rights guaranteed her by the Constitution. *Staub v. City of Baxley,* 78 S. Ct. 277, 355 U. S. 313, 2 L. Ed. 2d 302.

The decision in *New York Times v. Sullivan* compels review by the Court of this case. In the *Sullivan* case the Court has firmly applied the protection of the First and Fourteenth Amendments to present day publications derogatory of public officials. We now know that the immunity of a public official in our times from critical attack is, as it should be, diminished. This Court has told us the extent to which injury to a public person's reputation is not subject to redress. Yet, there ought to be, we submit, a corollary to the *Sullivan* rule, established in response to the question: To what extent is the reputation and good name of a purely private person in our times entitled to protection under the Constitution from false and malicious libel by an unscrupulous press?

(2) The judgment of the Supreme Court of Ohio abridges the civil rights of the petitioner guaranteed her under the Fourteenth Amendment of the Constitution of the United States.

Constitutionally protected privileges include those long recognized at common law as essential to the orderly pursuit of happiness by free men. *Pierce v. Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070; *Meyer v. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042. The enjoyment of private reputation, unassailed by a ruthless press, is a right deserving of protection under the Fourteenth Amendment. *Abott v. Tacoma Bank,* 175 U. S. 409, 20 S. Ct. 153, 44 L. Ed. 217. Although, as this Court implied in the *Abott* case, a state may possess the right to legislatively deprive its citizenry of the common law action for libel, Ohio has not done so. In fact the legislature of this state has given tacit recognition and approval to the existence of a civil remedy for injury to reputation. Section 2739.14 of the Ohio Revised Code,

creating criminal penalties for the refusal of a newspaper to retract a false publication, provides:

> "This section does not prevent the injured party from alleging and proving actual malice on the part of the publisher and any special damages resulting therefrom."

Possessed, as she was, with a remedy for injury to her reputation, the petitioner cannot, consistent with due process, be deprived of the redress obtained through civil suit by the action of an appellate court in totally ignoring the overwhelming evidence and the jury's verdict defining the name "Uncle Tom" and establishing special damages, in going entirely outside the record to a source we know not where in order to rule the name not libelous per se, and in substituting its own conclusions of fact, naked of any evidentiary support, for those of the jury and courts below.

(3) The judgment of the Supreme Court of Ohio deprives the petitioner of her right to trial by jury guaranteed her by the Constitutions of the United States and the State of Ohio.

In advancing this argument, we are aware of the several older decisions of this Court holding the right to trial by jury in a civil case not to be among those rights of a citizen protected against state action by the Fourteenth Amendment. Nevertheless, we submit that a right so fundamental ought to lack such protection no longer. The essential place occupied by the right of jury trial in our framework of freedom and democracy ought not to be confined to trial of criminal cases. *Beacon Theaters, Inc. v. Westover,* 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988; *Justices of the Supreme Court v. U. S. ex rel. Murray,* 9 Wall. 274; *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226.

Though it may be conceded that the states have possessed the power to dispense with trial by jury in civil cases, Ohio has not exercised such power. The right of trial by jury is guaranteed citizens of this state by the Ohio Constitution (Article I, Section 5) without distinction between cases criminal and civil.

Though vested with the right to have the issues of her suit resolved by a jury, the petitioner was effectively deprived of the right by the Ohio Supreme Court's invasion of the province of the triers of fact and the arbitrary substitution of its own unsupported conclusions of fact for those found by the jury from an abundance of evidence.

CONCLUSION.

For the reasons advanced and because of the great and substantial public interest and importance which this case involves, we submit the writ should issue.

Respectfully submitted,

HINTON, KONSTAND, LANDI & MIGDAL,
JAMES R. HINTON,
Attorneys for Petitioner.

APPENDIX 1.

OPINION OF THE SUPREME COURT OF OHIO.

Libel—Per quod—Not actionable without proof of special damages—No evidence of special damages—Jury verdict for plaintiff set aside.

1. Where the words of a publication are not libelous per se but are claimed to be so by innuendo, such words can only constitute libel *per quod* and are not actionable in the absence of proof of special damages to the one claiming to be libeled. (*Becker v. Toulmin,* 165 Ohio St. 549, approved and followed.)

2. Where there is a total lack of evidence of special damages to the plaintiff attributable to a claimed libel *per quod,* a judgment rendered upon a jury verdict for the plaintiff will be set aside.

(No. 39016—Decided July 28, 1965.)

The defendant, appellant herein, is an Ohio corporation engaged in publishing a newspaper known as "The Cleveland Call and Post."

The plaintiff is a woman 60 years of age, long active in community affairs and in Democrat [sic] party politics in the Akron, Ohio, area. She is a wife and mother of three children and is highly regarded in her community. In connection with the following matters, it is important to note that she is a Negro.

The defendant printed and published in The Cleveland Call and Post a headline article accompanied by a picture of the plaintiff. The article purported to be a factual report of an occurrence at a public seminar conducted by the then Governor, Michael V. DiSalle, in Akron, Ohio, on about March 6, 1962. The article appeared in the March 10 issue of The Cleveland Call and Post and

contained this large headline, "Angry DiSalle Calls Akron Woman 'Uncle Tom.' "

The article then went on to say:

"Akron—Gov. Michael V. DiSalle, whose frankness on some subjects keeps him on the political frying pan, berated Mrs. Bertha Moore, a veteran Democratic worker, for 'gross ingratitude' to the party.

"The Governor made the remarks in Akron before a group of Negro Democrats who met while the governor held a legislative seminar at the University of Akron last Tuesday.

"Leading Akron Democrats complained that very few Negroes of their city had obtained state jobs under DiSalle's administration.

"They ask the governor to explain why little recognition had been given to the Negro of Akron.

"The governor said that he was powerless to act because state jobs were controlled by the State Civil Service Commission.

"And then, turning towards Mrs. Moore, the governor using a cross-examination technique queried:

" 'Mrs. Moore, how long have you been a license plate registrar?'

"She replied: 'Since 1948.'

" 'Over the years, the party has taken care of you well for the things that you have done, wouldn't you agree, Mrs. Moore?'

"She replied, somewhat meekly, 'Yes.'

"Then DiSalle blurted out: 'In every minority group there are Uncle Toms who are detrimental to the progress of the group.'

" 'Here is a lady who has been well rewarded for the things that she has done and for some things she hasn't done,' the Governor said."

This article is the publication which is claimed to be libelous. Plaintiff's petition says that the article "branded the plaintiff as an 'Uncle Tom,' as a person who was a

detriment to the progress of her Negro minority group, as a person who was guilty of gross ingratitude to her political party and who had received and accepted rewards for service she had not performed * * *."

It is uncontroverted that Governor DiSalle did discuss the phrase, "Uncle Tom." In the record the following questions and answers of a witness are reported:

> "Q. In what connection did he [Governor DiSalle] use the phrase 'Uncle Tom'? A. He said in all minority groups, he said, there are some people who work for themselves, self aggrandizement, and that's when he brought in about Uncle Tom.
>
> "Q. What did he say? A. Every group has some Uncle Tom to work for themselves or whatever they can get at the expense of everybody else.
>
> "Q. What did he say with respect to his attitude toward Uncle Toms? A. Well, he would have no dealings with them."

Further on the following question was asked also of Mrs. Moore:

> "Q. Did he use that phrase with reference to you, Mrs. Moore? A. Oh, no."

Governor DiSalle admitted questioning Mrs. Moore and asking her how long she had served as a deputy motor vehicle registrar and whether she did not feel that the party had demonstrated an appreciation for her services. Governor DiSalle also stated that in the course of the discussion with the Negro group, but not relating to Mrs. Moore or anyone there, he had stated that some candidates for office or some office holders did use the "Uncle Tom" technique. Governor DiSalle admitted stating at the March 6 meeting, "I detest 'Uncle Toms'." and making that statement in the presence of a group in which Mrs. Moore was a member but not directing same towards Mrs. Moore.

Suffice it to say that the article concerning Mrs. Moore, while to some degree factual, was not sufficiently factual for this Court to hold it fair comment as a matter of law. After a great deal of evidence was presented on the matter, the trial judge held that the alleged libel was not per se and thus submitted the case to the jury which found by way of a special verdict as follows:

Question No. 1.

"Do you find by the greater weight of all the evidence that the statement in the defendant's newspaper on March 10, 1962, that Governor DiSalle called the plaintiff 'An Uncle Tom' was false? A. Yes."

Question No. 2.

"Do you find by the greater weight of all the evidence that the name 'Uncle Tom' as attributed to the Plaintiff in the newspaper edition of March 10, 1962, imputed to her conduct that tends to harm her reputation and lower her in the estimation of the community and deter persons from associating or dealing with her? Answer: Yes."

Question No. 3.

"If your answer to question No. 1 is 'yes,' then answer this question: Do you find by the greater weight of all the evidence that the name 'Uncle Tom' attributed to her as contained in the newspaper account of March 10, 1962, proximately caused the plaintiff any monetary loss in her business in selling motor vehicle license plates? Answer: Yes."

Question No. 4.

"Do you find by the greater weight of all the evidence that the defendant published said account of the March 6, 1962, meeting as contained in Plaintiff's Exhibit 1, with actual malice? Answer: Yes."

Question No. 5.

"In the event your answer to question No. 1 is 'yes' and your answer to question No. 4 is 'yes' then answer this question: Do you find by the greater weight of all the evidence in the exercise of a sound discretion on your part that the plaintiff should be awarded a reasonable and fair amount of money as compensation for the professional services of her attorney in prosecuting this lawsuit? Answer: Yes."

Question No. 6.

"If your answer to question No. 5 is 'yes,' then answer this question: What amount of money do you find would be fair and reasonable for such professional services rendered by plaintiff's attorney in prosecuting this action as shown by the greater weight of all the evidence? Answer: $2,000."

Question No. 7.

"In the event your answer to question No. 1 is 'yes,' and your answer to question No. 3 is 'yes,' then answer this question: What amount of money do you find represents reasonable and fair compensation for the monetary loss in the sale of motor vehicle license plates and pain, humiliation and embarrassment that the greater weight of the evidence shows that the publication on March 10, 1962, that the Governor called the plaintiff 'An Uncle Tom' proximately caused her to sustain? Answer: $5,000."

The jury in its special findings went on to find that the plaintiff was entitled to punitive damages in the amount of $25,000, thus making a total award of $32,000, and further found that the article printed was not a reasonable, fair and impartial account of what happened.

The Court of Appeals affirmed the judgment. In its opinion the Court of Appeals indicated that the petition sets out a good cause of action for libel per se.

Messrs. Hinton, Konstand & Landi and *Mr. James R. Hinton,* for appellee.

Mr. W. Howard Fort, Messrs. Brouse, McDowell, May, Bierce & Wortman and *Mr. Clarence W. May,* for appellant.

BROWN, J. It is apparent that the validity of the plaintiff's judgment depends upon two questions. One, are the words, "Uncle Tom," libel per se, and two, if such words are not libel per se are the words libel *per quod* and did the plaintiff, as she must in a case of libel *per quod,* prove special damages.

To be libelous per se words must be of such a nature that courts can presume as a matter of law that they tend to degrade or disgrace the person of whom they are written or spoken, or hold him up to a public hatred, contempt or scorn. *Digest Publishing Co. v. Perry Publishing Co.,* 284 S. W. 2d 832.

Judge Stewart, in a leading Ohio case, *Becker v. Toulmin,* 165 Ohio St. 549, points out that it is well settled in Ohio that in an action for libel the question of whether the publication complained of is libelous per se is primarily for the court and that it is error to submit to the jury the question of whether the publication is libelous per se. *Mauk v. Brundage,* 68 Ohio St. 89, is cited and quoted in that opinion as is *Cleveland Leader Printing Co. v. Nethersole,* 84 Ohio St. 118. In the *Becker* case, *supra,* at page 556, Judge Stewart said:

> "If the court can not determine a publication to be libelous per se as a matter of law, it may not allow the jury to do so as a matter of fact. * * *
>
> "We come now to a discussion of another kind of libel, to wit, libel *per quod.*
>
> "Libel *per quod* may occur where a publication, which, of itself, or per se, is not libelous, becomes so

by the use of an innuendo rendering the apparently harmless words into libelous ones by extrinsic evidence or, as is said, aliunde, as distinguished from per se.

"In the present case, plaintiff claims that the cablegram and letter, although they do not of themselves proclaim that defendant had discharged plaintiff for lack of professional competence, were capable of suggesting to a reasonable reader that defendant had discharged plaintiff for such reason; that it was proper to submit that question to the jury; and that, if the jury found that a reasonable reader could find the words libelous, the publication was libelous per se.

"We are unable to approve such doctrine. It constitutes a contradiction of terms. Libel per se means libel of itself, or upon the face of a publication, whereas libel *per quod*, is libel by an interpretation, through an innuendo, between an innocent or harmless meaning and a libelous one.

"If a publication can by innuendo be construed to be either nonlibelous or libelous, the question may be submitted to a jury provided special damages have been pleaded and proved by the one claiming libel. There can be no maintenance of an action for libel *per quod* in the absence of proof of special damages" (citing *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118).

The foregoing long quotation is extremely apt in the instant case. The words, "Uncle Tom," have no commonly understood opprobrious meaning to one who is not knowledgeable in the language of the comparatively recent militant civil rights movement. The term "Uncle Tom" takes its definition from the character in Harriet Beecher Stowe's "Uncle Tom's Cabin." One visualizes that character as loyal, patient, humble and long suffering. Since this is a commonly accepted meaning of the term as in-

dicated in Webster's New International Dictionary (2 Ed), the plaintiff, under the case cited, was required to prove the innuendo and the damage.

The innuendo was pleaded. The petition says, "branded the plaintiff as an 'Uncle Tom,' as a person who was a detriment to the progress of her Negro minority group, * * * as a person who was disloyal to her race * * *." Mrs. Moore testified that the phrase, "Uncle Tom," as directed to a person has an established meaning in ordinary usage today *among the Negro population generally* as "a person who will sell out his community, his race, who will do things for himself rather than for his people * * *."

Mr. Edward Jerome Davis, another highly regarded member of the Negro race and prominent member of the Democrat [sic] party was called as a witness for the plaintiff and testified that "Uncle Tom" meant to the Negro community "a person who for selfish reasons would sell—we use the term 'sell out'."

The Reverend Mr. Lynton defined an "Uncle Tom" as a "Judas Goat" but further testified that there is a difference of opinion in the Negro community as to what constitutes an "Uncle Tom."

The trial court during the trial specifically ruled that the words, "Uncle Tom," if libel at all were libel *per quod*. For this reason the meaning or innuendo of the words required a fourth of this record and the special verdict included (without objections of plaintiff) special findings as to whether the words, "Uncle Tom," imputed to the plaintiff conduct tending to harm her reputation and lower her in the estimation of the community and deter people from dealing with her.

Since such words are libel *per quod* the claim of the defendant that there was no evidence of special damage

sufficient to sustain such an action becomes most important. The petition does not plead special damage although the law requires a plaintiff in such an action to do so. The petition claims that Mrs. Moore suffered money damages in the amount of $10,000. This is a most general allegation. Cases involving allegations which are sufficient to permit recovery of special damages from false publications are collected in an annotation in 86 A. L. R. 848. Those cases require that the particular contracts, sales, customers, patients or clients lost must be alleged as a prerequisite to recovery of special damage. The cases in this annotation are numerous and persuasive.

The failure to plead such special damages would have barred proof of such; but none was offered. The evidence which the plaintiff presented to prove special damage concerned the claimed monetary loss in plaintiff's business of selling automobile license plates. That testimony, considered most favorably to the plaintiff's claim, would show a difference in sales for the year 1961 (before the alleged libel) of 1,800 plates sold, for the year 1962 (after the alleged libel) of 1,600 plates sold. The difference in gross profit to the plaintiff did not exceed $70. It was not shown that this difference was attributable to the claimed wrongful conduct of the defendant. There is no evidence that a single person who intended to or might have been an applicant for license plates read the article and by reason thereof abstained from buying a license plate from the plaintiff. Such proof is essential. Newell, Slander and Libel, Fourth Ed., Section 755, page 842; Gatley, Libel and Slander, 2d Ed. 677; *Bigelow v. Brumley,* 138 Ohio St. 574; *Schaffhauser Bros. v. Hemmer,* 152 Iowa 200, 131 N. W. 6; *Del Rico v. New Mexican, Inc.,* 56 N. Mex. 538, 246 P. 2d 206; *Pecyk v. Semoncheck,* 61 Ohio Law Abs. 465; annotation, 86 A. L. R. 848.

In view of the total lack of evidence of special damages, the judgment must be reversed and final judgment rendered for the defendant.

Judgment reversed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT and SCHNEIDER, JJ., concur.

APPENDIX 2.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Filed July 28, 1965.)

This cause, here on appeal from the Court of Appeals for Summit County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and, this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered that final judgment is rendered for the defendant.

It is ordered and adjudged also that appellant recover from appellee costs expended in this Court, in the Court of Appeals and Court of Common Pleas; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

APPENDIX 3.

OPINION OF THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO.

(Argued May 14, 1964.)

(Decided June 17, 1964.)

HUNSICKER, *P. J.*

This is an appeal on questions of law in a libel action wherein a large amount of money was awarded the appellee, Mrs. Moore, upon a judgment rendered on the verdict of a jury. The appeal is in behalf of appellant, The P. W. Publishing Co., Inc., hereinafter called "Publishing Company." The appellant says the trial court committed many errors that were prejudicial to its substantial rights.

In such assignments of error, appellant complains as follows, and attacks: The venue of the action; the refusal to sustain a demurrer; refusal to direct a verdict for the appellant; and the failure to instruct the jury that the publication complained of did not constitute libel per se. The appellant also says that: the evidence shows no malice, and no libel per quod was pleaded hence the trial court erred in submitting to the jury the question of attorney fees, punitive damages and compensatory damages; the trial court failed to define the issues to the jury; there was misconduct on the part of counsel for Mrs. Moore, and there was, in this case, a clear abridgment of the freedom of the press contrary to the constitutional guarantees of such freedom.

From our reading of the record of testimony, and examination of the exhibits, the conclusion is inescapable that the Publishing Company, in total disregard of the truth, and in a callous attempt to discredit the appellee, Mrs. Moore, in the eyes of her friends and associates, stated that the then governor of Ohio called her an "Uncle.

Tom"—an epithet which, the testimony shows, is, to the members of the Negro race, insulting, degrading, and an allegation that such person, for personal gain, betrays his race. It is such an epithet as subjects the person against whom it is used to ridicule, contempt and disgrace among persons of the Negro race. As one witness said, an "Uncle Tom" to the Negro is a "Judas goat," the animal that leads others of its kind to be slaughtered.

The case was tried to a jury and submitted to it by a special verdict. The jury found affirmatively that: a statement was published that the then governor of Ohio had called Mrs. Moore an "Uncle Tom," which statement was false; such statement imputed to her conduct that "tends to harm her reputation and lower her in the estimation of the community and deter persons from associating or dealing with her"; such statement caused her monetary loss in her business of selling license plates; the statement was published with "actual malice" (which the court defined to the jury as: "characterized by hatred or ill will, a spirit of revenge, retaliation, or determination to vent his feelings upon other persons. Actual malice may be inferred from conduct and surrounding circumstances as shown by all the evidence"); the publication was not a reasonable, fair and impartial account as to what transpired at the meeting, which meeting is claimed to be the basis of the publication complained of in these proceedings.

The jury, also, in such special verdict, set the amount of money for attorney fees, compensatory damages and punitive damages.

The Publishing Company, with a distribution in northern Ohio, including the city of Akron and Summit County, sent its newspaper, with an eight-column, front-page spread of the story about Mrs. Moore and Governor DiSalle (such story having the picture of Mrs. Moore also beside

it), throughout its circulation area. This was followed some days later by two similar articles, called editorials, with a cartoon picture of Mrs. Moore in each of such so-called editorials. These editorials appeared on different days as expressions of the official opinion of the newspaper.

In our consideration of the case, we are first met with the claim of improper venue. Such claim is not tenable. The Publishing Company entered its appearance without reservation and cannot now complain of lack of jurisdiction. *Railroad Co. v. Morey,* 47 O. S. 207; *Bucurenciu v. Ramba, et al.,* 117 O. S. 546, at p. 549.

The Publishing Company now says that the petition, as well as the evidence, does not establish a cause of action for libel in favor of Mrs. Moore.

The allegations in the petition set out that Mrs. Moore, in a publication issued and distributed by the appellant Publishing Company, was falsely accused of having been called "an 'Uncle Tom,' * * * a person who was a detriment to the progress of her Negro minority group, as a person who was guilty of gross ingratitude to her political party and one who had received and accepted rewards for service she had not performed * * *." Many other claims of like nature concerning Mrs. Moore, were alleged in the petition to have been published, all such statements impugning disloyalty to her race and political party. It was alleged that the governor of Ohio made these statements about her in a meeting with a committee of Negro citizens which included Mrs. Moore.

The evidence conclusively established the falsehood of the defamatory statements concerning Mrs. Moore as contained in the publication.

As late as the case of *Becker v. Toulmin, Jr.,* 165 O. S. 549, the Supreme Court of Ohio quoted with approval the second paragraph of the syllabus in the case of *Cleveland*

Leader Printing Co. v. Nethersole, 84 O. S. 118, wherein it is stated:

> "To constitute a publication respecting a person libelous per se, it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred, or contempt, or affects him injuriously in his trade or profession."

The court then, in the *Becker v. Toulmin, Jr.,* case, *supra,* went on to say:

> "If language in a publication has of itself the foregoing effect, then that language constitutes libel per se, and the one so libeled may maintain an action for libel and recover damages, without pleading or proving special damages. In such a libel, malice is presumed and damages may be allowed for the effect of the libel upon the person libeled. However, in order to constitute libel per se, it must appear that the words in the publication of themselves injuriously affect the person concerning whom they are said. If they can reasonably have another and innocent meaning and are not libelous of themselves, they can not constitute libel per se."

See also, *Harper & James, The Law of Torts,* Vol. 1, § 5.9, 372.

We must, therefore, determine herein that the petition sets out a good cause of action for libel per se.

It should be noted here that it is the function of the court to determine whether the publication constituted libel per se. *Becker v. Toulmin, Jr., supra; Mauk v. Brundage,* 68 O. S. 89. It is also the function of the court to determine, as a matter of law, whether the publication has a privilege which brings it within the aura of free speech and a free press. *Mauk v. Brundage,* 68 O. S. 89; *New York Times Co. v. L. B. Sullivan,* 11 L. Ed. 2d, p. 686.

We have heretofore stated that the trial court submitted to the jury a special verdict covering the effect of the published article on Mrs. Moore in her relation with other people. The subject of actual malice was also answered by the jury. By their answers to these questions, the jury was required to pass to the subject of damages, since the jury determined that the statements in the publication were defamatory and false and actuated by hatred and ill will.

While it is true herein that Mrs. Moore was able to show only a small amount of claimed pecuniary loss, yet such loss is only a small part of what is properly to be considered as general damages in this type of case. The rule seems to be that "in an action for a personal tort, an injury to the feelings, naturally and necessarily resulting from the wrongful act, may be considered by the jury in their estimate of compensatory damages, whether or not the case is one in which damages beyond compensation may be awarded." Damages, 16 *O. J.* 2d § 84, p. 220.

There can be no question in this case about the right to award punitive damages. The nature of the defamatory and false statements made, as the jury found with actual malice, justifies the award of punitive damages and the award of attorney fees. See Damages, 16 *O. J.* 2d p. 281, § 145, and authorities cited.

We have examined all of the claimed errors and find none prejudicial to the substantial rights of the appellant. The judgment must be affirmed.

Judgment affirmed.

STEVENS, *J.*, and COLLIER, *J.*, concur.

(Collier, *J.*, of the Fourth District, sitting by assignment in place of Doyle, *J.*)

APPENDIX 4.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.

(Filed: October 16, 1963.)

This cause came on to be heard upon the pleadings and the evidence, a jury having been duly impaneled and sworn and thereupon was submitted to a jury upon a special verdict, prepared by the Court and the jury having returned their special verdict and it appearing to the Court upon said special verdict that the plaintiff is entitled to recover from the defendant as hereinafter set forth;

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the plaintiff recover from the defendant the sum of Thirty-Two Thousand Dollars ($32,000.00) in accordance with said verdict and the costs of this action.

Exceptions granted to the defendant.

APPENDIX 5.

SPECIAL VERDICT IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO.

We, the Jury, having been duly impaneled and sworn, do hereby, this 15th day of October, 1963, find the ultimate and determinative facts as appears by our answers to the following questions:

Question No. 1

Do you find by the greater weight of all the evidence that the statement in the defendant's newspaper on March 10, 1962 that Governor DiSalle called he plaintiff "an Uncle Tom" was false?

Answer: Yes

And we make said answer to said question upon the concurrence of twelve members of our Jury.

(Signatures of twelve jurors)

Question No. 2

Do you find by the greater weight of all the evidence that the name "Uncle Tom" as attributed to the Plaintiff in the newspaper edition of March 10, 1962, imputed to her conduct that tends to harm her reputation and lower her in the estimation of the community and deters persons from associating or dealing with her?

Answer: Yes

And we make said answer to said question upon the concurrence of twelve members of our Jury.

(Signatures of twelve jurors.)

Question No. 3

If your answer to Question No. 1 is "YES," then answer this question:

Do you find by the greater weight of all the evidence that the name "Uncle Tom" attributed to her as contained in the newspaper account of March 10, 1962, proximately caused the Plaintiff any monetary loss in her business in selling motor vehicle license plates?

Answer: Yes

And we make said answer to said question upon the concurrence of eleven members of our Jury.

(Signatures of eleven jurors)

Question No. 4

Do you find by the greater weight of all the evidence that the defendant published said account of the March 6, 1962, meeting as contained in Plaintiff's Exhibit 1, with actual malice?

Answer: Yes

And we make said answer to said question upon the concurrence of eleven members of our Jury.

(Signatures of eleven jurors)

Question No. 5

In the event your answer to Question No. 1 is "YES," and your answer to Question No. 4 is "YES," then answer this question:

Do you find by the greater weight of all the evidence in the exercise of a sound discretion on your part that the Plaintiff should be awarded a reasonable and fair amount of money as compensation for the professional services of her attorney in prosecuting this lawsuit?

Answer: Yes

And we make said answer to said question upon the concurrence of eleven members of our Jury.

(Signatures of eleven jurors)

Question No. 6

If your answer to Question No. 5 is "YES," then answer this question:

What amount of money do you find would be fair and reasonable for such professional services rendered by Plaintiff's attorney in prosecuting this action as shown by the greater weight of all the evidence?

Answer: $2,000.00

And we make said answer to said question upon the concurrence of ten members of our Jury.

(Signatures of ten jurors)

Question No. 7

In the event your answer to Question 1 is "YES," and your answer to Question No. 3 is "YES," then answer this question:

What amount of money do you find represents reasonable and fair compensation for the monetary loss in the sale of motor vehicle license plates, and pain, humiliation and embarrassment that the greater weight of the evidence shows that the publication on March 10, 1962, that the Governor called the Plaintiff "an Uncle Tom," proximately caused her to sustain?

Answer: $5,000.00

And we make said answer to said question upon the concurrence of eleven members of our Jury.

(Signatures of eleven jurors)

Question No. 8

In the event your answer to Question No. 1 is "YES," and your answer to Question No. 3 is "YES," and your answer to Question No. 4 is "YES," then answer this question:

In the exercise of a sound discretion do you find that the Plaintiff should also recover punitive damages from the Defendant, apart from and in addition to any compensation that she might recover for any alleged monetary loss in her business in selling motor vehicle license plates and personal injuries sustained by her?

Answer: Yes

And we make said answer to said question upon the concurrence of eleven members of our Jury.

(Signatures of eleven jurors)

Question No. 9

In the event your answer to Question No. 8 is "YES," then answer this question:

In the exercise of your sound discretion, in the light of all the evidence, what amount of money should the Plaintiff recover from the Defendant as punitive damages?

Answer: $25,000.00

And we make said answer to said question upon the concurrence of ten members of our Jury.

(Signatures of ten jurors)

Question No. 10

Do you find by the greater weight of all the evidence that the report of the meeting between Governor DiSalle and some Negroes, including the Plaintiff, as contained in the paper edition of March 10, 1962, (of which Plaintiff's Exhibit 1 is a copy) was a reasonable, fair, and impartial account as to what transpired?

Answer: No

And we make said answer to said question upon the concurrence of eleven members of our Jury.

(Signatures of eleven jurors)

APPENDIX 6.

NOTICE OF APPEAL TO SUPREME COURT OF OHIO.

The P. W. Publishing Co., Inc., the defendant-appellant in the above entitled action, files this Appeal from the judgment entered on June 24, 1964, by the Court of Appeals of Summit County, Ohio, Ninth Judicial District, in Case No. 5462 on the Dockets of said Court of Appeals, which judgment, affirmed the entry of a judgment by the Court of Common Pleas of Summit County, Ohio, in the sum of Thirty-Two Thousand Dollars ($32,000.00), in an alleged libel action, in which Common Pleas Court this action originated, being civil action No. 236555 on the Dockets of said Common Pleas Court.

This defendant-appellant alleges that the action involves a substantial constitutional question arising under Article I and Article XIV of the amendments to the Constitution of the United States.

s/ W. Howard Fort,

Brouse, McDowell, May, Bierce & Wortman,
By s/ Clarence W. May, *Of Counsel,*
Attorneys for Defendant-Appellant.

APPENDIX 7.

DEFINITIONS OF "UNCLE TOM."

In the *Dictionary of American Slang,* compiled by Harold Wentworth, Ph.D., and Stuart Berg Flexner, M.A., and published in 1960, the following appears with reference to the meaning of the name "Uncle Tom":

> "Uncle Tom (derogatory). A sycophantic Negro; a meek or ambitious Negro who defers to, and curries the favor of, white people, either for personal gain, from habit, or usually in an attempt to appease whites who are Anti-Negro in feeling; a Negro who casts himself as inferior to white people. 1956: 'An "Uncle Tom" is one who caters to white taste.' S. Longstreet, The Real Jazz Old and New, 47 Orig. Negro use. From the chief character in Harriet Beecher Stowe's 'Uncle Tom's Cabin.' "

In the book, *Black Like Me,* a factual account of the experiences of author John Howard Griffin as he travelled through the deep South disguised as a Negro, there appears the following excerpt of a conversation which the author has with an elderly Southern Negro:

> " 'A lot of the people I've talked to think we've turned the other cheek too long,' I said.

'You can't get around what's right, though,' he said. 'When we stop loving them, that's when they win.'

'How's that?'

'Then they'll have ruined our race for sure. They'll have dragged us down plumb to the bottom.'

'Are you just supposed to let them carry on then?'

'No * * * we can't do that any longer. We're supposed to get our rights in a proper way. And try to understand that it's hard for them too, to change around from the old ways. We've got plenty of old Uncle Toms that don't want things changed any more than the whites. You can give them two dollars and they'll pull the string that sends us all to hell. They're a disgrace to our race. And then we've got plenty of young smart-aleck people that don't want nothing except the chance to 'get even' with the whites * * * they're full of hate and piss and it's a God's shame. They're just as much Judases as the Uncle Toms.' "

In the March 1, 1964 edition of the *New York Times,* Alex Haley, a noted Negro author, wrote:

"It is a deep irony that, a century later, the very name of Mrs. Stowe's hero is the worst insult the slaves' descendants can hurl at one another out of their frustrations in seeking what all Americans take for granted."

In a scene from the Metro-Goldyn Mayer motion picture, "Trial," released in 1955, a communist attorney seeks to arouse the Negro trial judge (Motley) to the point where he will lose control:

Barney (shouts)

Motley, you've no right to listen to this drivel!

(rises, fights off bailiff)

Blake is an unmitigated liar! Pass your sentence and let's get out of here! You've let race prejudice railroad an innocent boy to a death sentence! You ought to

disqualify yourself for incompetence! You're a frightened little man selling out his own people for a fancy title and a black gown! They may call you judge to your face, but they've got better words behind your back! You're a handkerchief-head! You're an Uncle Tom!

Throughout the preceding, Barney has struggled with two policemen who have been trying to help the bailiff. Finally they subdue him. Consuela cheers. Judge Motley, trembling with anger, fights to control himself, wins.

In an article entitled "A Harlem Sketchbook: White Man Walk Easy," in the June 13, 1964 edition of *Saturday Evening Post,* Roger Kahn writes:

"Mistrust of whites is worn like a badge of honor in Harlem today. The worst insult of all is to be called an 'Uncle Tom' ! "

In a syndicated article which appeared in most newspapers on August 2, 1964, entitled "Harlem Always Is a Riot Waiting To Happen," Louis Lomax wrote:

"As an enclave of suspicion and doubt, Harlem is incapable of reacting to anything. Every Negro spokesman of national stature has long since been named an 'Uncle Tom,' and every successful Negro is ipso facto accused of 'selling out to the white man'; every evidence of racial progress, regardless of how clear, is scoffed at; and any Negro who suggests that we change our position and consolidate our gains is maligned."

In an editorial of the *Detroit Free Press* reprinted in the *Akron Beacon Journal* on August 1, 1964, there appeared the following comments with reference to the present case:

" 'Uncle Tom,' in case anyone still doesn't know, is a term of opprobrium meaning that the Negro to

which it is applied is a servile sycophant to the white man for reasons selfish, hypocritical or craven.

Despite the Call and Post's contention that the term has no harmful connotation, the courts ruled that among Negroes it is an epithet which insults and degrades. Anyone familiar with its use doesn't need a court to tell him that.

It isn't exactly customary for a newspaper to cheer the defense's loss of a libel action. Nevertheless, we are pleased it has now been established that those who are called 'Uncle Tom' have a precedent for hitting the name-caller hard in the pocket-book.

For it has come to be that it is a name principally tossed about by irresponsibles who seek to seize Negro leadership from the capable, conscientious and constructive.

Trouble fomenters in the main, they talk of winning progress for the Negro with means that only obstruct it. And, tragically, they sometimes lure followers away from Negro men and women having the wisdom and dedication necessary to hasten their race's upward course."

THE GOVERNOR OF OHIO SAID TO THE GOVERNOR OF N.CAROLINA
SURE! YOU CAN HAVE HER, GOV... YES, ANYTHING FOR A PAL!
DiSALLE
Call-Post
JUDGE

When Mrs. Mae Mallory asked:

"How can Governor DiSalle feel that I will get a fair trial?" she was asking a question that has struck terror to the hearts of thousands of Negroes who have managed to escape from the "justice" of the southland.

Mrs. Mallory, who denies participation in an alleged kidnapping of a white couple during a racial disturbance in Monroe, N. C., asked the question of the Governor for she fears for her life if she is returned to that state.

In spite of the plea, however, DiSalle saw fit to lend Mrs. Mallory absolutely no aid in her fight for justice.

The Governor agreed with an extradition warrant and said the lady must go back to North Carolina to face that state's so-called courts.

DiSalle said he talked to Governor Sanford of the southern state and he had been assured that if Mrs. Mallory is returned every precaution would be taken to guarantee her safety.

There is only one thing wrong with this assurance:

The Governor of North Carolina has nothing to do with the activities of the sheriffs, the juries and the judges in his state.

It is little wonder that Mrs. Mallory exclaimed, "DiSalle has doomed me," when it was learned that she had been ordered back to North Carolina.

She describes the City of Monroe like this:

"This is the town where a black man has never been acquitted when accused of a crime against a white man, and a white man has never been convicted when accused of a crime against a black man.

"This is the town where two little black boys, ages seven and nine, were sent to reform school to stay until they are 21 because a little white girl kissed them.

"The chances are I'll never reach Monroe alive. And under the best possible conditions, I will not get a fair trial."

Governor DiSalle of Ohio and Governor Sanford of North Carolina may be bosom buddies, but for Ohio's Chief Executive to be so ruthless that he would send a Negro woman back to such dangerous conditions just doesn't make sense.

Al Sweeney, political columnist for this newspaper (The Cleveland Call and Post) has said that DiSalle "boasted that he knew how to handle certain Negroes, if he had to."

If the sending of Mrs. Mallory, the mother of two children, back to North Carolina is a sample of his methods, then the voters of Ohio have every right to feel he is unfit to serve in the high office of Governor.

Enough is enough!

The man makes elementary mistakes and he sticks to them.

Because of DiSalle's dogged determination not to take advice from anyone, there is little wonder that one newspaper has accused him of making "a priceless contribution to the cause of white supremacy."

It may never be known what the Governor of North Carolina actually said to the Governor of Ohio, but whatever was said, it certainly didn't do Mrs. Mallory and the citizens of this state any good.

The interests of all citizens will be well served if DiSalle is voted out of office on Tuesday, November 6, 1962.

Contents Printed Herein Are Issued By:
The Ohio Democrats for Rhodes Committee
William Lacy, Chairman
1311 Heat Ct., S.E., Canton, Ohio

Auditor James A. Rhodes, Candidate for Governor, Sets Achievement Record

Those who have had the opportunity to observe the work and record of James A. Rhodes, candidate for Governor, are of the opinion that Ohio is fortunate in having a man of his caliber as the next Chief Executive of the state.

The former three-term Mayor of the City of Columbus, and now Auditor of State, has a brilliant record in the field of human relations.

In the matter of jobs and employment opportunity, Jim Rhodes has no equal in Ohio government, on any level, when it comes to dealing with problems of minority groups.

Following is a sample of the Rhodes Record of Achievement as a member of the Columbus School Board, Auditor of the City of Columbus, Mayor of the City of Columbus, and Auditor of the State of Ohio:

- Appointed the first Columbus Community Relations Commission to deal with minority group problems and an attendant committee to prevail upon private industry to employ Negro workers.
- Appointed a Negro chairman of the Air Pollution Committee for the City of Columbus.
- Appointed the first Negro to membership on the City (Columbus) Planning Commission.
- Appointed several Negro nurses, one of who is now a supervisor, in the Columbus Health Department.
- Appointed a Negro woman to head the X-Ray Division of the Health Department.
- Appointed a Negro attorney to the chairmanship of the Civil Service Commission.
- Appointed a Negro to membership on the Jobs and Progress Committee of the City of Columbus.
- Appointed a Negro Captain, now a Battalion Chief, in the Columbus Fire Department.
- Eliminated Jimcrowism in the Fire Department.
- Increased the employment of Negroes by the City of Columbus to over 300 percent.
- Appointed a Negro woman to the Columbus Recreation Commission, the first to serve in such a capacity.
- Appointed a Negro Market Master for the City of Columbus, the first of three to be named to the important position.
- Sponsored and secured employment for Many Negro athletes, including three Olympic track and field champions.
- Appointed a Negro to a cabinet position in the Columbus City Administration.
- Appointed two Negroes in charge of street assessments an account totaling over $200,000.00 a year.
- Appointed the first Negro Captain of Police in a major city in the United States, who later became the first Negro Inspector of Police in the country.
- Appointed the first Negro Playground Supervisors in the City of Columbus.
- Appointed a Negro as Assistant Superintendent of Buildings for the City of Columbus.
- Appointed the first Negro State Examiners (18) in Ohio serving in County, City, University, Highway, Departmental and Liquor Audits in the Bureau of Inspection and Supervision of Public Offices Department of the Auditor of State.
- Increased Negro employment in the Auditor of State's Office by over 1500 percent.

Who is, or what is an "Uncle Tom?"

Certainly Mrs. Bertha Moore, leader of Negro Democrats in the City of Akron, is not one.

The lady, however, got hit with the uncomplimentary epithet from the sharp and caustic tongue of Governor DiSalle.

The unbelievable incident happened at one of the DiSalle's "non-political" seminars at the University of Akron.

During a question period, Mrs. Moore asked the Governor why more Negro citizens have not been given employment under his administration.

Spectators at the affair report DiSalle flew into a rage and came up with this reply:

"In every minority group there are Uncle Toms who are detrimental to the group."

The fact that Mrs. Moore sought to gain more employment for Negro workers would not, by any stretch of the imagination, place her in the position of an "Uncle Tom."

But, true to his gift of running off at the mouth, the Governor called her an "Uncle Tom" anyway.

The Beacon Journal, Akron's daily newspaper, heard about the attack on Mrs. Moore and had this to say:

"Governor DiSalle's . . . sharp tongue got him into trouble with Negro Democrats during a recent Akron visit."

The paper quoted the Governor as telling Mrs. Moore "the party has taken care of you well for the things you have done."

"Then DiSalle stuck in the needle," the Beacon Journal said, "by recalling that in 1960 she was a candidate for delegate to the Democratic national convention on a slate which bucked the Governor's leadership."

DiSalle continued to insult Mrs. Moore with such force that she is quoted by this newspaper (The Cleveland Call and Post) as crying:

"What are you trying to do, Governor, kill me?"

The newspaper further revealed: "The assemblage of Negroes sat aghast and one informant said 'I could have crawled through the nearest hole.' "

DiSalle seems to have a patent on the ability to insult Negro women.

At least two others have felt the degrading recoil of his cutting and supposedly cute remarks.

One is Mrs. Mae Mallory, now in jail in Cleveland where she is fighting through the courts an attempt of DiSalle to send her back to North Carolina "justice" on what is believed to be a trumped up kidnapping charge.

The other is Miss Serena Davis, former Ohio NAACP field secretary, who was berated by DiSalle for defending the right of peaceful picketing against stores with discriminatory employment practices.

This man has got to go.

The job can be done by voting against DiSalle's return to the Governor's office on Tuesday, November 6, 1962.

Struggle for Civil Rights Not Confined to Southland

The current struggle for civil rights is not solely a problem of the South. There is plenty of room for improvement in the North.

In the State of Ohio there still remain a great many pockets of resistence to the proposition that all people, regardless of race, creed, or color, are deserving of a position of first class citizenship.

Within the next several days -- on Tuesday, Nov. 6, 1962, to be exact -- the citizens of this state will go the polls to elect a Governor.

In the State of New York there is Governor Nelson Rockefeller. His liberal approach to the race problem has helped to make New York a near model state with respect to civil rights.

In Ohio, citizens have a candidate for Governor whose record in the field of human rights is unsurpassed. He is James A. Rhodes, Auditor of State.

Rhodes' record as Mayor of the City of Columbus, and in his present position, gives every indication that all citizens, and minorities in particular, are fortunate in having him as a candidate for Governor.

With Rockefeller in the Governor's chair in the State of New York and James A. Rhodes as the Chief Executive of the State of Ohio, a great many of the discriminatory practices against Negro citizens in the North will be sharply reduced.

If Ohioans want to elect a Governor who is concerned and will do something about employment and housing opportunities and who wishes to see all people treated with human decency, then they would do well to elect James A. Rhodes the next Governor of ohio.

At least three Negro women in the state of Ohio have felt the humiliating verbal lash of Governor DiSalle. They are:

1. Mrs. Mae Mallory, now of Cleveland, who has spent six months in the Cuyahoga County jail.

She's in jail because the Governor, in his dictatorial and "know it all" manner, has decided that she should be sent back to the State of North Carolina.

A sheriff in Monroe, N. C., where a Negro has never been known to receive a fair trial, charges Mrs. Mallory is guilty of kidnapping a white couple during a racial disturbance.

The State of North Carolina wants the State of Ohio to send Mrs. Mallory back to face these charges.

They call the request an extradition proceeding.

And, to shock every right thinking citizen in this state, Governor DiSalle agreed to the deal.

He said Mrs. Mallory's life would be safe in North Caroline because he talked on the telephone with Governor Sanford of that state and he (DiSalle) had been guaranteed that the Negro woman would not be lynch-murdered, or beaten to within an inch of her very life.

Ha!

How uninformed can the Governor of Ohio be?

Governor Sanford has absolutely no control over what the people, police, prosecutor, jury and judge will do in the case of Mrs. Mallory.

DiSalle could be sending a Negro woman to her death on a phony charge.

2. Mrs. Bertha Moore, of Akron, is another victim of the DiSalle regime.

He called Mrs. Moore an "Uncle Tom" to her face simply because she asked the Governor why more Negro citizens had not been appointed to jobs in Akron.

He called Mrs. Moore this insulting name because she was trying to help eliminate the bad employment condition of Negro citizens.

3. Miss Serena Davis, former field secretary of the NAACP, also suffered the wrath of Ohio's governor.

Discussing the peaceful picketing of stores that refuse to hire Negroes, DiSalle told Miss Davis:

"It is attempts like this to operate outside the law that bring entire movements into disrepute.

"... the NAACP can start the same sort of violence that exists in some southern communities ... there was no need for Negroes to picket F. W. Woolworth stores. ..."

Compare the Governor's treatment of Mrs. Edythe Klumpp, a convicted Cincinnati murderess, with that given to these three Negro women.

DiSalle turned to every trick in the book to save Mrs. Klumpp, a white woman, from the electric chair, and did!

This man is too much!

He can be voted out of office on Tuesday, November 6, 1962.

GOVERNOR BRINGS SOUTHERN IDEAS TO OHIO
" IT IS ATTEMPTS LIKE THIS TO OPERATE OUTSIDE THE LAW THAT BRING ENTIRE MOVEMENTS INTO DISREPUTE "

At numerous times, and in no uncertain terms, the present Governor of Ohio made it known that he is not in sympathy with the manner in which Negroes are struggling for civil rights.

DiSalle thinks it is wrong for Negro citizens to picket stores and institutions that discriminate.

The Governor agrees with his southern associates when he accuses organizations like the National Association for the Advancement of Colored People, (NAACP), Congress of Racial Equality, (CORE), and student groups, Central State College at Wilberforce, Ohio), of "operating outside the law" in fighting for civil rights for all Americans, regardless of race, creed or color.

What kind of meat does this man DiSalle feed upon?

Here's a man who rode into office as the result of votes cast by Negro citizens who never suspected he had no compassion or care for those crying on the bottom rung of the political and employment ladder.

There's little wonder that this newspaper (The Cleveland Call and Post) had this to say in exposing the Governor for what he really is:

". . . nor can the governor, for all his protestations of deep concern about civil rights, be expected to know the full impact of being refused a job purely because of color."

The NAACP, CORE and student groups all over this country are fighting desperately for civil rights and first class citizenship.

And neither Governor DiSalle of Ohio, Governor Sanford of North Carolina, Governor Patterson of Alabama, Senator Eastland of Mississippi, Governor Faubus of Arkansas, the Talmadges of Georgia, the Longs of Louisiana, Senator Irvin of South Carolina, or Senator McClellan of Arkansas are going to stop the determined drive of Negro Americans to make democracy work.

They're tired of loudmouth politicians like DiSalle.

Negro Americans want action and deeds, not lip service and empty promises.

The chubby man from Toledo didn't get elected; he backed into office on someone else's mistakes.

DiSalle failed to understand the result of an election that put a big job into the hands of a little man.

He thinks he has the right, not only to tax and spend the people to death, but he also thinks he has a right to deny Negro citizens their civil and job rights.

The best way to get southern ideas out of the State of Ohio is to get the man from Toledo out of the Governor's chair.

The opportunity comes on Tuesday, November 6, 1962.

Let's get to work now and prepare for "D-Day!" - get rid of DiSalle Day.

JAMES A. RHODES, candidate for Governor, said this to the 1962 NAACP State Conference of Branches Convention in Cleveland:

"Though progress has been slow, the NAACP is deserving of great commendation for its sustained effort in tearing down the barriers of race prejudice.

"And one of the most heartening phases of the struggle is that in seeking advancement for the Negro, the NAACP has made life better for all Americans.

"It is my hope that one day, in the not too distant future, the NAACP will be able to safely change its name for the National Association for the Advancement of Colored People to the National Association for the Advancement of ALL people."

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 693.

BERTHA V. MOORE,

Petitioner,

v.

THE P. W. PUBLISHING COMPANY, INC.,

Respondent.

BRIEF OF THE P. W. PUBLISHING COMPANY, INC.
In Opposition to Allowance of Writ of Certiorari.

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TABLE OF CONTENTS.

Opposition to Allowance of Writ of Certiorari to the Supreme Court of Ohio ---------- 1

As to Jurisdiction ---------- 2

Questions Presented ---------- 3

As to Petitioner's Statement of Case ---------- 5

As to the Right of Trial by Jury ---------- 7

Conclusion ---------- 10

TABLE OF AUTHORITIES.

Cases.

Abbott vs. Natl. Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217 ---------- 8

Hawkins vs. Bleakley, 243 U. S. 210; 61 L. Ed. 678 ---------- 8

Keller vs. Stark Electric Railway Co., 102 O. S. 114 ---------- 9

Marvin vs. Trout, 199 U. S. 212; 50 L. Ed. 157; Affirming 70 O. S. 437 ---------- 8

Treat Mfg. vs. Steel & Iron Co., 157 U. S. 718; 39 L. Ed. 853 ---------- 8

Constitutions.

Constitution of Ohio, Art. I, Sec. 5 ---------- 9

Constitution of the United States:

Amendment VII ---------- 7

Amendment XIV ---------- 7, 8

Statutes and Rules.

28 U. S. C. 1257 ---------- 1, 2, 4, 10

Supreme Court Rule 23(f) ---------- 2

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THE P. W. PUBLISHING COMPANY, INC.,

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BRIEF OF THE P. W. PUBLISHING COMPANY, INC. In Opposition to Allowance of Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The respondent, The P. W. Publishing Company, Inc., respectfully prays this Court, that the petition for certiorari filed herein be denied for the following reasons:

First: That the petition for certiorari filed herein fails to show that this Court has jurisdiction thereof, under Section 1257 of the Federal Judicial Code.

Second: That said petition fails to show that any federal question was involved:

(a) In the decision of the trial court; or

(b) The Ohio Court of Appeals; or

(c) The Supreme Court of Ohio.

Third: That the decision of the Ohio Supreme Court was based merely on the question of the legal sufficiency of the petition, and of the evidence adduced in the trial court, necessary to support an action for libel per quod, and was not based on any federal question.

Fourth: That the involvement of a federal question was not at any time raised or presented by the petitioner, or adjudicated by either the trial court, the Ohio Court of Appeals, or the Supreme Court of Ohio.

Fifth: The judgment of the Supreme Court of Ohio is based on adequate and independent state grounds.

AS TO JURISDICTION.

The petitioner, as to jurisdiction, claims that this case falls within the provisions of 28 U. S. Code, Section 1257. The applicable part of this section is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> "(3) By writ of certiorari, where * * * any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States. June 25, 1948, c. 646, 62 Stat. 929."

We submit that under the circumstances shown by the plaintiff's petition and her brief in support thereof, there is no error of constitutional dimensions or of a substantial federal question, shown and that the petitioner has stated no case which may be reviewed by this Court.

Supreme Court Rule 23 (f) in respect to certiorari to review a state court decision, requires that the petitioner's statement shall specify the stage in the proceedings,

in the Court of first instance and in the Appellate Court, to which, and the manner in which the federal questions sought to be reviewed were raised, and the method of raising them and the way they were passed on by the court, as will show the federal question was timely and was properly raised.

Petitioner does not comply with this rule of the Supreme Court, for the obvious reason that a constitutional or federal question was at no time raised in the state courts.

QUESTIONS PRESENTED.

As to petitioner's statement of "questions presented," this respondent, The P. W. Publishing Company, Inc., submits that the petitioner's statement of the questions presented is entirely erroneous.

It is universally held, that where the publication is libelous per se, damages are presumed. Where, however, the publication is libel per quod, no recovery may be had unless special damage is both alleged in the petition, and proven by the evidence. This rule is universally recognized and no citation of authority is necessary.

The alleged libel here involved, concededly is not one of a libel per se. The Ohio Supreme Court held that in a libel per quod, special damages must be both pleaded and proven. The court held that the petitioner had failed to plead special damages and further that there was no proof of special damages. That in the absence of both pleading and proof of special damages, the judgment of the lower court had to be, and was, reversed.

The actual question, then, is simply this:

> Where the petitioner does not allege a libel per se, but merely alleges a libel per quod, and the petition fails to allege special damages, and the evidence fails to

show special damages, and the State Supreme Court, for this reason denies a recovery, has the petitioner been denied "any title, right, privilege or immunity" under the Constitution of the United States, such as would warrant the allowance of a writ of certiorari?

We submit that under such circumstances, the petitioner cannot claim that she has been denied any federal constitutional or statutory right, and that the petition for certiorari, in this Court is not authorized by Section 1257. The fact that the respondent, The P. W. Publishing Co., Inc., may have claimed immunity under the federal constitution, cannot aid this petitioner, who failed to "specially set up or claimed" any right under the constitution or statutes of the United States, and especially so where the state supreme court did not pass on any federal question, in respect to the claims of either the petitioner or the respondent.

AS TO PETITIONER'S STATEMENT OF CASE.

Petitioner's "statement of case" can be clarified somewhat, by pointing out that the alleged libel grew out of the May 1962 Ohio political primary. Governor DiSalle, in this primary, was opposed by Hon. Mark McElroy, as the candidate for Governor. Both the petitioner, Bertha V. Moore, and William O. Walker, the president of The P. W. Publishing Company, Inc., the respondent herein, opposed the candidacy of Governor DiSalle. Bertha V. Moore and William O. Walker were personal friends.

The petitioner, Bertha V. Moore, gave her political primary support to Mark McElroy. However, McElroy was defeated in this political primary. Petitioner, Bertha V. Moore, a Democrat, could expect no political favors from Rhodes, should he be elected in the subsequent November general election. The petitioner, therefore, wisely turned her November general election support to Governor DiSalle.

It should be noted that Governor DiSalle and the petitioner, Bertha V. Moore, were both public political characters and both were office holders, she being at the time a Deputy Registrar of motor vehicles.

It should be further noticed that the alleged libelous publication was a castigation of DiSalle, because of his alleged treatment of the petitioner, Bertha V. Moore. A critical examination of the publication complained of, will readily disclose that the publication was in no wise in derogation, or critical of Mrs. Moore and, on the contrary, the alleged libelous publication, came to her defense, as against the alleged statements of the Governor. It was no wise a libel on her, even though it was severely critical of the Governor.

The same observation may be made of the October 6 and October 13, 1962 publications, which appear as Appendix 8 attached to petitioner's brief.

The publication of October 6 states:

> "Who is, or what is, an Uncle Tom? Certainly Mrs. Bertha Moore, a leader of Negro Democrats in the City of Akron, is not one."

The publication of October 13 contains the language:

> "Mrs. Bertha Moore of Akron is another victim of the DiSalle regime."

> "He called Mrs. Moore an Uncle Tom to her face simply because she asked the Governor why more Negro citizens had not been appointed to jobs in Akron."

Definitions of Uncle Tom contained in petitioner's Appendix 7 were not a part of the Record.

On page 7 of petitioner's statement of case, there appears a most unfortunate statement by counsel for the petitioner. The political affiliations of the Supreme Court of Ohio are referred to. The inference is that their political affiliations induced the judgment herein sought to be reviewed. What induced the seventh member of the Supreme Court of Ohio, to concur with the six alleged Republican judges is not explained, all seven judges having concurred in the decision.

The statement on page 8 of petitioner's brief, is equally unfortunate in stating that the Supreme Court of Ohio,

> "in an obvious effort to foreclose review by this court, attempted to place full reliance in reversing the judgment below on the grounds it regarded as non-federal."

These statements cannot be regarded as anything short of impeaching the judicial integrity of the members of the Supreme Court of Ohio.

It is important to note that the Call and Post is a Negro newspaper, published by Mr. W. O. Walker, also a Negro, which newspaper had a circulation of only 500 copies in a Summit county population of 500,000. The circulation was primarily among Negroes and petitioner failed to show that anyone had read the publication, or was in any manner influenced by the publication.

AS TO THE RIGHT OF TRIAL BY JURY.

The petitioner claims that merely because the state trial court erroneously submitted the issues to the jury, and because the jury returned a finding and verdict in her favor, the judgment became impregnable and not subject to review by the Supreme Court of Ohio. That under Amendment VII and Amendment XIV of the Constitution of the United States, the Supreme Court of Ohio could not review or reverse the judgment of the lower courts, even though erroneous.

Now, it has been uniformly held that Amendment VII of the federal Constitution, in respect to the right of trial by jury, applies only to federal courts, and has no application to right of trial by jury in the state court.

However, right of trial by jury in a federal court, under Amendment VII of the federal Constitution, has uniformly been held not to be applicable under all facts and under all circumstances. A federal court may still direct a jury to find a verdict for the defendant, where the facts warrant such direction. Jurisdiction of the U. S. Supreme Court does not attach where the federal trial court's direction was proper.

"That the circuit court directed the jury to find a verdict for the defendant does not give this court jurisdiction on the ground that the plaintiff was deprived of the right of trial by jury and, therefore, that the case involves the Constitution or application of the Constitution of the United States."

Treat Mfg. Co. vs. Steel & Iron Co., 157 U. S 718; 39 L. Ed. 853.

Moreover, it is held that there is nothing in Amendment XIV of the federal Constitution, which requires a jury trial in a federal court.

"5. Trial by jury is not embraced in the rights secured by the 14th amendment to the Federal Constitution."

Hawkins vs. Bleakley, 243 U. S. 210; 61 L. Ed. 678.

Again, a state statute does not deny federal due process of law, merely because the state statute does not provide for or permit a trial by jury.

"2. A judgment founded upon a state statute is not wanting in due process of law because the statute does not provide for or permit a trial by jury."

Marvin vs. Trout, 199 U. S. 212; 50 L. Ed. 157; Affirming 70 O. S. 437.

Thus, where a state supreme court denied plaintiff recovery, for libelous statements contained in a pleading, because such statements were privileged, this Court held that such a disposition of the case in the state court, involved no question of a federal nature which would support a review by this Court.

Abbott vs. Natl. Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217.

So, likewise, as in the case at bar, for a state court to deny a plaintiff recovery, for libel per quod, because of lack of pleading allegations, and lack of proof of special damage, is a matter of general law, and involves no constitutional, statutory, or federal question, sufficient to support the allowance of a review by certiorari.

The Supreme Court of Ohio, in *Keller vs. Stark Electric Railway Co.*, 102 O. S. 114, fully sets forth the application of Article I, Section 5, of the Constitution of Ohio, relative to the right of trial by jury, as it applies to Ohio jurisprudence:

> "1. The sustaining of defendant's motion, at the conclusion of all the evidence, to withdraw the case from the consideration of the jury and render judgment for the defendant, upon the ground that there has been no evidence introduced tending to prove some essential averment of plaintiff's petition, does not involve a question arising under the Constitution of the United States or of this State."

It would be a strange doctrine, indeed, if a litigant were entitled to a jury trial:

(a) Where his petition (as in the case at bar) does not state a cause of action; and

(b) Where the petition and the evidence does not legally warrant a recovery.

The Supreme Court stated:

> "The failure to plead such special damages would have barred proof of such; but none was offered."

This is the extent of the decision of the Ohio Supreme Court, herein sought to be reviewed. The rule in respect to either a directed verdict, or a final judgment, on review, is substantially the same, in both a state or federal court.

CONCLUSION.

In conclusion, we submit:

First: That the petition for the allowance of a writ of certiorari fails to disclose that this Court has jurisdiction thereof under Section 1257 of the Federal Judicial Code.

Second: That the petition fails to show that any constitutional, statutory or federal question was either claimed or adjudicated by the Supreme or lower Courts of the State of Ohio.

Third: That the adjudication made by the Supreme Court of Ohio was based solely on the insufficiency of both pleading and proof, a purely state question of general law, and not one involving a constitutional, statutory or federal question.

For the above-stated reasons, we submit that the writ of certiorari should be denied.

Respectfully submitted,

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